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Case No.

In The

SUPREME COURT OF THE UNITED STATES

JAMES A. GARDNER,

Petitioner,

v.

THE BRADENTON HERALD, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

AND APPENDIX

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QUESTION PRESENTED

WHETHER SECTION 934.091, FLORIDA STATUTES (1977) IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE FREEDOM OF THE PRESS PROVISIONS OF THE UNITED STATES CONSTITUTION.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The opinion of the Supreme Court of the State of Florida, not yet reported, appears in the appendix hereto as "A1-22."

JURISDICTION

The Supreme Court of Florida entered its judgment on March 1, 1982. It denied a timely petition for rehearing on April 28, 1982 and this petition for certiorari was filed within ninety days of that date.

QUESTION PRESENTED

Whether Section 934.091, Florida Statutes (1977) is unconstitutional because it violates the freedom of the press provisions of the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Respondent, plaintiff below, Bradenton Herald, Inc., filed an action for declaratory decree against Petitioner, James A. Gardner, in his official capacity as State Attorney for the Twelfth Judicial Circuit of Florida on August 17, 1979 (A23-30)

Following a Motion to Dismiss, Respondent filed an Amendment to Complaint (A31-32) and an Amendment to Amended Complaint (A41-42). Petitioner filed his Answer on September 27, 1979 (A43-46).

As grounds for relief, the Amended Complaint alleged that Section 934.091, Florida Statutes (1977), was unconstitutional as a prior restraint on Freedom of the Press and for placing criminal sanctions upon the publication of the names of persons who have been the subject of a legal wiretap. The Respondent alleged that they had the name and identity of a person or persons who had neither been indicted nor informed against by the Petitioner or other appropriate prosecuting authority, which person or persons may or may not now have been served with an inventory or notification of interception of wire or oral communications pursuant to the provisions of Section 934.09(7), Florida Statutes (1977), whose wire or oral communications have, in fact, been intercepted. The Respondent further alleged that it was its purpose and intent

to publish the names of the said individuals as prohibited by the provisions of the subject statute (A17).

In Petitioner's Answer, the Petitioner alleged that the information sought to be published was not lawfully obtained information and therefore not afforded First Amendment protection (A21). This affirmative defense was striken by the Court and the Court specifically held that whether the names were lawfully or unlawfully obtained was irrelevant.

The Petitioner also filed a Motion to Compel Oral Discovery in order to take the deposition of Robert Ratner, a reporter for the Bradenton Herald, Inc. The Purpose of Oral Discovery was to determine the name of the person in the possession of the newspaper who was the alleged subject of the wiretap and,

should the name prove to be a wiretap subject, the source of the information to determine whether the information was lawfully obtained. The Court granted the Petitioner's motion insofar as it allowed the Petitioner to determine the name of the subject, but refused to require the reporter to divulge the manner in which it was obtained (A47-51).

The name was verified as being that of John Doe, intervenor in this cause. The deposition of Robert Ratner was sealed by court order in order to prevent the name of John Doe from becoming a part of the public record.

The case proceeded to final hearing on November 16, 1979. The Petitioner and the Intervenor alleged and argued two compelling governmental interests in the subject statute; the necessity for secrecy in an ongoing criminal

investigation concerning wiretaps and the right to privacy of the person who is the subject of the wiretap (A52-56).

On February 12, 1980, the Court entered a final judgment declaring Section 934.091, Florida Statutes (1977) unconstitutional as an infringement on the First Amendment freedom of the press, and as being vague (A57-62).

A timely motion for rehearing was filed by the Petitioner (A63-70) and denied by the Court (A71-72).

Timely notice of appeal was filed and the Supreme Court of Florida's jurisdiction was invoked pursuant to Fla. R.App. P. 9.030(a)(1)(A). The Supreme Court of Florida adopted the reasoning of the trial court and found Section 934.091, Florida Statutes to be unconstitutional (A1-22). A timely

petition for rehearing was filed by the Petitioner (A73-77) and denied by the Court (A78-79).

Petitioner filed a timely Motion to Stay Mandate in the Supreme Court of Florida, which was granted up to and including May 28, 1982, in order to allow Petitioner to seek review of this Court (A 80-81).

Petitioner next filed Motion to Extend Stay of Mandate in this Court, which was denied on May 25, 1982 (A 82). This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

SECTION 934.091, FLORIDA STATUTES (1977) DOES NOT VIOLATE THE FREEDOM OF THE PRESS PROVISIONS OF THE UNITED STATES CONSTITUTION.

In declaring Section 934.091, Florida Statutes (1977) unconstitutional, the Florida Supreme Court determined that statute resulted in a prior restraint on the press.

The challenged Statute reads as follows:

> "934.091 Unlawful to publish names of parties to intercepted communications; penalty, - -
> (1) No person shall print, publish, or broadcast, in any newspaper, magazine, periodical, or other publication, or from any television or radio broadcasting station, the name or identity of any person served with, or to be served with, an inventory or notification of interception of wire or oral communications pursuant to a 934.09(7)(e) until said person has been indicted or informed against by the appropriate prosecuting authority.

> (2) Whoever is convicted of the violation of the provisions of this section is guilty of a felony of the third degree, punishable as provided in s. 775.082, by a fine not to exceed $10,000 or as provided in s. 775.084.

This statute does not constitute a "prior restraint" on the freedom of the press since there is no prior injunction or restraining order against publication. Compare Nebraska Press Association v. Stuart, 427 UA 539, 96 S.Ct. 2791, 49 L.Ed 2d 683 (1976) with Landmark Communications, Inc. v. Virginia, 435 US 829, 98 S.Ct. 1535, 50 L.Ed 2d 1 (1978) and Smith v. Daily Mail Publishing Co., 443 US 97, 99 S.Ct. 2667, 61 L.Ed 2d 399 (1979).

This distinction is really of no concern, however, since the statute does impose criminal penalties. As the United States Supreme Court recently

stated in Smith v. Daily Mail Publishing Company, supra:

> "(3) Whether we view the statute as a prior restraint or as a penal sanction for publishing *lawfully obtained*, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity. Prior restraints have been accorded the most exacting scrutiny in previous cases. See Nebraska Press Association v. Stuart, supra, at 419, 49 L.Ed 2d 683, 96 S.Ct. 1791; Organization for Better Austin v. Keefe, supra at 419, 29 L.Ed 2d 1, 91 S.Ct.1575; Near v. Minnesota ex rel Olsen, supra at 716, 95 L.Ed 2d 1357, 51 S.Ct. 625. See also Southeastern Promotions, Ltd. v. Conrad, 420 US 546, 43 L.Ed 2d 448, 95 S.Ct. 1239 (1975). However, even when a state attempts to punish publication after the event it must nevertheless demonstrate that its punitive action was necessary to further the state interests asserted. Landmark Communications, Inc. v. Virginia, supra at 843, 56 L.Ed 2d 1, 96 S.Ct. 1535."
> (61 L.Ed 2d 404)

The question therefore is whether the statute furthers the state interests

asserted. In order to sustain validity, the state interest must be of the highest form.

Petitioner is not unmindful of the role of the press and the ends to be achieved through the freedom afforded it:

> "A responsible press has always been regarded as the handmaiden of effective judicial administration . . . its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."
>
> Sheppard v. Maxwell, 384 US 333, 340, 86 S.Ct. 1507, 16 L.Ed 2d 600 (1966).

However, the state interests in this statute are of the highest form and, when balanced against the very limited intrusion into the First Amendment, the results indicate that the statute

passes constitutional muster.

There are two very important interests to be protected by Section 934.091. The first is the protection of the integrity of an ongoing criminal investigation. The second is the right to privacy of the individual who is the subject of the wiretap.

Chapter 934 presents a comprehensive plan for the use of wire and oral communications. It provides protection to the individual from unreasonable seizure of such communications as well as the right of state police agencies to intercept and use such communications in criminal investigations and as evidence when based upon probable cause. A fine balance has been struck between the rights of the individual and the interests of law enforcement:

> "934.01 Legislative findings -- On the basis of its own investigations and of published studies, the Legislature makes the following findings:
>
> (3) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.
>
> (4) To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurance that the interception is justified and that the information obtained thereby will not be misused."

By statute, a wiretap order cannot be issued unless it is based upon probable cause, Section 934.09(3),Florida Statutes (1979). However, before such an order

can be issued it must be shown that the law enforcement agency has reasonably exhausted other investigative techniques or that other available techniques are unlikely to succeed or are too dangerous. See State v. Barnett, 354 So.2d 422 (Fla. 2d DCA 1978). As such, a wiretap is virtually a last resort device, the success of which depends *exclusively* upon the fact that the parties being intercepted have absolutely no knowledge of the wiretap.

There can be no doubt that the protection of an ongoing criminal investigation is a compelling governmental interest of the highest order, which is rendered useless when a subject reads in the newspaper or sees a report on television that his phone is presently being wiretapped in connection with a criminal investigation. The injury does

not stop there. Whenever a wiretap order is issued, there has to be probable cause to believe that communications concerning an offense will be intercepted. This presupposes that more than one individual is involved in the crime. Therefore, if but one person's name is published, an entire investigation into the criminal activities of numerous individuals is destroyed. (See Justice Atkins dissenting opinion). This is particularly true in investigations concerning narcotic or other dangerous drugs, gambling, dealing in stolen property, Florida Anti-Fencing Act violations and criminal conspiracies to commit such acts. Such a disclosure can also cost the life of an individual as in kidnapping cases.

The Florida Supreme Court opinion also overlooks the statutory right to privacy which is the gravamen of Chapter 934. See Section 934.01(4), Florida Statutes (1979). This right to privacy has withstood a First Amendment attack before the Court in the recent past. Shevin v. Sunbeam Television Corporation, 351 So.2d 723 (Fla.1977).

Against these interests must be balanced the limited intrusion into the First Amendment which this statute entails. Section 934.091 only abridges publication of the name or identity of the person served with or to be served with an inventory of notification of interception until that person has been indicted or informed against. In other words, only during the crucial period of time during a criminal investigation that the subject does not know he has been wire

tapped is the press in any way abridged. At the point where the secrecy of the investigation is no longer imperative, the statute allows publication.

A comparison of the statute in question with the statute and analysis contained in Smith v. Daily Mail, supra, demonstrates the soundness of this law. In Smith, two newspapers of general circulation in West Virginia published the name of a fourteen year old boy who was arrested in connection with the shooting death of a schoolmate. A West Virginia statute declared such publication a crime punishable as a misdemeanor. An indictment was lodged against the two newspapers who then sought and received a writ of prohibition from the West Virginia Supreme Court of Appeals. The prosecutor and the county court judge petitioned to this Court. In affirming the West

Virginia Supreme Court, this Court did not reach the issue of whether the statute was a "prior restraint." This Court held that there was no doubt about the fact the juvenile's name was lawfully obtained. The reporter had received it from witnesses and police officers at the scene of the incident. This Court further pointed out that the statute applied only to newspapers and not to the media as a whole. In fact, three radio stations had broadcast the name of the juvenile before the Daily Mail decided to publish it.[1/] Quoting Cox Broadcasting Corp. v. Cohn, 420 US 469, 95 S.Ct. 1029, 43 L.Ed

1/ In Mr. Justice Rehnquist's concurring opinion, he found this to be the dispositive point concerning the constitutionality of the statute. Since the statute did not apply to the electronic media, it didn't further the state interest asserted by preserving the anonymity of the juvenile. Had it applied uniformly to all media, he would have found it constitutional.

2d 328 (19750, the Court stated:

> "By placing the information in the public domain on official court records, the STate must be presumed to have concluded that the public interest was thereby being served. . . States may not impose sanctions on the publication of truthful information contained in official records open to public inspection. Id. at 495,43 L.Ed 2d 328,95 S.Ct. 1029." (61 L.Ed 2d at 405)

The sole interest advanced by the State to justify the statute was to protect the anonymity of the juvenile offender. The Court held that this state interest was not sufficient to justify the application of criminal penalties to respondents and that the statute's approach did not satisfy constitutional requirements since it did not restrict the electronic media as well.

Compared with the law in Smith, the statute sub judice suffers no such infirmities. The information sought to be published by the Bradenton Herald is not now and never has been a part of the public record of any county of this state. The

statute in question applies uniformly to the electronic media as well as the press. Also, the information sought to be published in the case sub judice was not *lawfully obtained!* Section 934.091 (1) states that *"No person* shall print, publish or broadcast, or *cause to be* printed, published or broadcasted.

Section 934.02(5),Florida Statutes (1979) defines "person" for the purposes of this chapter as *"any employee or agent of the state or political subdivision thereof* and any individual, partnership, association, joint stock company, trust or corporation: Therefore, the name of the subject of a wiretap obtained from an agent of a political subdivision of this state who is inside a criminal investigation is not lawfully obtained information since the agent is committing a crime by disclosing the name to the reporter.

Taken together with the two compelling state interests involved, the limited infringement caused by this statute upon Respondent's right to print the name of a wiretap subject is neither unreasonable nor unconstitutional. The destructive impact that such a disclosure could have on an ongoing criminal investigation is enormous.

The United States Fifth Circuit Court of Appeals has ruled that newsgathering warrants some degree of First Amendment protection, and while the extent of such protection has remained somewhat uncertain, it is clear that it is not without bounds. United States v. Gurney, 558 F.2d 1302,1308 (5th Cir. 1977). The right to speak and publish does not carry with it the unrestrained

right to gather information, Zumel v. Rusk,381 US 1,17, 85 S.Ct. 1271,1281, 14 L.Ed 2d 179 (1945). The First Amendment right to gather news has been defined in terms of information to the public generally, Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed 2d 626 (1972). See also: Pell v. Procunier, 417 US 817, 94 S.Ct. 2800, 41 L.Ed 2d 495 (1974) and Garrett v. Estelle, 558 F.2d 26, 1274 (5th Cir. 1977). The press cannot be denied access to information already within the public domain, Cox Broadcasting Corp. v. Cohn, supra. Yet, the United States Constitution does not require the government to accord the press special access to information not shared by members of the public generally. United States v. Gurney, supra. Denials of access to proceedings such as Grand

Jury hearings and judicial conferences are based upon fundamental governmental interests and protection of other rights which override the concerns of the public. Id. Thus, a statute making it a crime to publish specific information as in Section 934.091 represents a valid public interest as determined by the Legislature. See also: United States v. Woods, 544 F.2d 242 (6th Cir. 1976, rehearing denied 1977).

Analogous to the case at bar is State v. Evjue, 253 Wis. 146, 33 N.W. 2d 305 (1948), which upheld the validity of a state statute penalizing newspaper, magazine, periodical or circular publications of the identity of a female subjected to a rape or similar criminal assault. In so holding, the Court stated that the slight restriction of freedom of the press proscribed by the statute is outweighed by

the interests in avoiding embarrassment and offensive publicity of the victim. The Evjue case is still good law, and has been reaffirmed according to 86 A.L.R. 3d 80 which cited Cox Broadcasting Corp. v. Cohn, supra and Napier v. Jefferson Life Insurance Co., 322 F.2d 502 (4th Cir. 1963) which upheld a similar South Carolina statute.

This concept that the First Amendment is not an unlimited, unrestricted, absolute right was reiterated in United States v. Fuller, 202 F.Supp. 356, U.S.D.C. (Cal. 1967). That case dealt with a California statute proscribing unauthorized interception of communications by wire or radio, which the Court explained had been upheld on a number of occasions. A newspaper man obtained information by listening to a police broadcast radio, contending it was a public information which he could

gather and publish. In dismissing that argument, the Court stated that Congress has the power to forbid wire-tapping, interception, and divulgement of protected radio messages. Id. p. 358. The Fuller court again upheld the California statute as being an exception to freedom of the press, stating that it is so clear and apparent that any change in the law is for the legislature, and not the courts. Id. p. 359.

Unless the First Amendment is an absolute, this statute is constitutional. It is uniform in application, imposes but a limited infringement, and serves compelling state interests.

The prevailing view is that the press is not free to publish with impunity everything and anything it desires to publish, Branzburg v. Hayes, supra.

The judgment of the Supreme Court of Florida declaring Section 934.081, Florida Statutes (1977) unconstitutional should be reversed.

CONCLUSION

For these reasons, Petitioner respectfully urges this Court to grant certiorari and reverse the holding of the Supreme Court of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Larry K. Coleman, Esquire, Knowles, Blalock, Coleman, Landers & Walters, P. A., 802 11th Street, West, Bradenton, Florida on this the 31st day of July, 1982.

Of Counsel for Petitioner